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Matt Moroney, Deputy Secretary
Wisconsin Department of Natural Resources
101 S. Webster Street
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Re: Attorney General's Statement Regarding Authority to Administer NPDES Permit Program

Dear Mr. Moroney:

In your letter of October 14, 2011, you indicate that the U.S. Environmental Protection Agency (EPA) has been reviewing the authority of state agencies for their EPA-approved National Pollutant Discharge Elimination System (NPDES) programs under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq. You state EPA recently completed its review of Wisconsin's WPDES program and sent the Department of Natural Resources ("Department" or "DNR") a letter identifying seventy-five questions or concerns with Wisconsin's authority to administer the program. You indicate that several of those issues are being addressed by DNR, but for some of the issues, the Department believes it is appropriate to seek an Attorney General's statement at this time.

The following is my response to the issues presented in your letter dated October 14, 2011.

Issue # 5 Right to Judicial Review.

1. Is the opportunity to seek judicial review of the final approval or denial of a WPDES permit equivalent to the opportunity to seek judicial review under 40 CFR § 123.30 and CWA § 509?

Response. In my view the answer is yes. CWA § 509(b)(1)(F) [33 U.S.C. § 1369(b)(1)(F)] allows any interested person to seek judicial review of an EPA permit decision. Wisconsin Stat. § 227.52 requires that the decision "adversely affect the substantial interests of any person." The federal and state case law establish that these two standards are effectively the same. The 7th Circuit Court of Appeals has stated that "[t]o qualify as an 'interested person,' at a minimum, a party must have Article III standing." *Texas Independent Producers and Royalty Owners Ass'n v. E.P.A.*, 435 F.3d 758, 764 (7th Cir. 2006) (citations omitted). Based on the

Supreme Court's decision in *Lujan v. Defenders of Wildlife* (504 U.S. 555, 560-61 (1992)), the 7th Circuit stated that, generally, Article III standing "requires a petitioner to 'demonstrate an injury in fact; a causal link between the injury and the challenged action; and redressability through a favorable court decision.'" *Texas Independent Producers*, 435 F.3d at 764 (citations omitted). An "injury in fact" entails an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560.

In Wisconsin the standing requirement for a petition for judicial review under Wis. Stat. §§ 227.52 and 227.53 encompasses a two-step analysis, which asks first "'whether the decision of the agency directly causes injury to the interest of the petitioner,'" and second "'whether the interest asserted is recognized by law.'" *Waste Management of Wisconsin, Inc. v. State of Wisconsin Department of Natural Resources*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988), citing *Wisconsin's Environmental Decade, Inc. v. Public Service Comm.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975).

The three federal standing requirements are contained within Wisconsin's standing requirements. Wisconsin's requirement that the agency's decision directly cause the petitioners injury is the same as the Supreme Court's "causal link" requirement. Wisconsin's requirement that an asserted interest be recognized by law is the same as the Supreme Court's "injury in fact" requirement that requires an "invasion of a legally protected interest." The federal redressability requirement is implicitly contained within the Wisconsin standard for standing. Moreover, if there is no redressability, then the case is moot. "An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy." *PRN Associates LLC v. State, Dept. of Admin.*, 2009 WI 53, ¶ 29, 317 Wis. 2d 656, 766 N.W.2d 559, citing *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 11, 278 Wis. 2d 24, 692 N.W.2d 219.

It should be noted that 33 U.S.C. § 1369(b)(1) allows an interested party to challenge the issuance or denial of a permit within 120 days of the determination. Wisconsin Stat. § 227.53(1)(a) requires that the petition for review of an agency decision must occur within 30 days after the service of the decision. Petitioners in Wisconsin have the same right to challenge an agency decision even though they just have a shorter time frame in which to initiate the action.

2. In conjunction with your first question above, you ask whether any individual person may directly seek judicial review of the state's permit decision, or whether seeking administrative review under Wis. Stat. § 283.63 is a prerequisite to judicial review of the decision? For this question, you ask me to consider *Sewerage Commission v. DNR*, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981) in my statement.

Response: In my view the answer is yes – an individual person may seek judicial review of the state's permit decision. However, other entities and groups of five individuals or more

must seek administrative review of the state's permit decision under Wis. Stat. § 283.63 before seeking judicial review of the decision.

Under Wis. Stat. § 283.63(1):

> Any permit applicant, permittee, affected state or 5 or more persons may secure a review by the department of any permit denial, modification, suspension or revocation, the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit, any proposed thermal effluent limitation established under s. 283.17 or any water quality based effluent limitation established under s. 283.13 (5). . . .

Under Wis. Stat. § 283.63(2), the decisions of the DNR under this section are subject to judicial review as provided in §§ 227.52 to 227.58. By the express terms of Wis. Stat. § 283.63(1), a lone individual who is not an applicant, permittee, or affected state cannot secure an administrative review of a permit decision before seeking judicial review under Wis. Stat. § 283.63(2). Only a permit applicant, permittee, affected state, or five or more persons may secure the administrative review, and the judicial review that follows. Only Wis. Stat. §§ 227.52 to 227.58 is available to and provides the right of judicial review of agency WPDES decisions to individual persons who are not listed in Wis. Stat. § 283.63(1).

In *Sewerage Commission v. DNR*, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981), the Wisconsin Supreme Court held that a judicial declaratory judgment action brought by a permittee, the Sewerage Commission, under Wis. Stat. § 227.05(1) (1973) – to declare invalid a DNR rule and the permit based on the rule – had to be dismissed because the exclusive means for obtaining that remedy was provided by operation of §§ 147.20 [now Wis. Stat. § 283.63], 227.05(2) [now § 227.40(2)] and 227.15-21 [now §§ 227.52-227.58]. That more specific procedure is to challenge the validity of the permit based on the invalid rule within the administrative and judicial review process for challenging WPDES permit provision under Wis. Stat. § 147.20 (1973). *Sewerage Commission* is distinguishable in a very crucial respect from the situation in the question you pose, and clearly does not apply to it. In that case, the Commission, as a "permittee" under § 147.20(1), had the right to administrative and judicial review of the challenged rule under § 147.20, of which the court held the Commission should have availed itself. *See* 102 Wis. 2d at 633. The court observed that under § 147.20, "[a] party affected by administrative action does not lose any rights, remedies, or forums by the preclusion of a later declaratory challenge . . . . Its rights and remedies under sec. 147.20 are the same" as under § 227.05. 332 Wis. 2d at 631. This is not so with respect to individual persons. Individual "affected" persons did not then, and do not today, have the right either to challenge a decision or to challenge a rule under Wis. Stat. § 283.63. Thus, the only means of judicial review of WPDES decisions for lone individuals is through Wis. Stat. §§ 227.52-227.58.

On the other side of the coin, however, the decision in *Sewerage Commission* strongly suggests that "[a]ny permit applicant, permittee, affected state or 5 or more persons" must invoke Wis. Stat. § 283.63 before attempting to obtain judicial review of a DNR WPDES permit. In *Sewerage Commission*, the Commission attempted to challenge the validity of the 1974 WPDES permits that contained a requirement to comply with permit limitations by January 1, 1975.[1] In that case, the Commission sought, a significant time after the permit was issued, to challenge the condition in the permit by filing an action under Wis. Stat. § 227.05(1) – the general provision in the Wisconsin Administrative Procedure Act (Wis. Stat. ch. 227) for challenging the validity of administrative rules. Although that case involved an action to declare an administrative rule invalid, the action sought to challenge the validity of the DNR permit that was based on the challenged rule. The court took note of the provision in Wis. Stat. § 227.05(2)(e) [now § 227.40(2)(e)] that states,

> 227.05 Declaratory judgment proceedings.
>
> (2) The validity of a rule may be determined in any of the following judicial proceedings when material therein:
>
> (e) Proceedings under ss. 227.15 to 227.21 . . . for review of decisions and orders of administrative agencies provided the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

102 Wis. 2d at 626 (quotation marks removed). Wisconsin Stat. §§ 227.15 to 227.21 [now §§ 227.52-227.58] provide for judicial review of agency decisions. The court observed that the Commission could have challenged the validity of the permit by challenging the validity of the rule (on which the offending permit provision was based) at the time the permit was issued, and that it could and should have done so first by seeking administrative review under § 147.20:

> Under sec. 147.20(2), Stats., the DNR's ruling on a challenge by a permit holder to the reasonableness or necessity of terms or conditions of the permit is expressly characterized as a "decision" judicially reviewable under secs. 227.15 to 227.21. Therefore, a declaratory challenge to the validity of the rule (NR 210.10) underlying such decision was available under the clear and unambiguous terms of sec. 227.05(2)(e). Under that statute, the only prerequisites for such a challenge would be that the validity of the rule first be raised before the agency, and that

[1] Although not discussed in the case, the running of the 30-day statute of limitations to obtain judicial review of the permit under Wis. Stat. §§ 227.15 et seq. may be why the Commission found it necessary to collaterally attack the permit in a declaratory judgment action. However, the parties do not appear to have raised, and the court did not address, the issue whether the declaratory judgment action was precluded by the Commission's failure to seek earlier judicial review of the permit under Wis. Stat. §§ 227.15 et seq. (now §§ 227.52-227.58).

> judicial review thereof be undertaken within thirty days of the DNR's decision on the permit review. . . .
>
> In other words, a declaratory challenge to the validity of a rule on which a permit is based is available under sec. 147.20, Stats., in joint operation with ch. 227. The only requirements are that such a challenge raised pursuant to the procedural dictates of sec. 147.20 must first be sought at the agency level within sixty days of issuance of the permit; the underlying rule must be challenged at that time; and within thirty days of the department's decision thereon, judicial review may be sought, including the raising of a declaratory challenge to the rule.

Sewerage Commission, 102 Wis. 2d at 626-627 (citation and emphasis omitted).

Based on this rationale, the court enunciated several holdings:

> We conclude, therefore, that sec. 147.20 authorizes a permit holder to challenge the legality, and not just the factual reasonableness, of administrative action in setting permit terms and conditions. We also conclude that sec. 227.05(2)(e), Stats., if it is invoked upon timely judicial review of a department decision on a permit-review pursuant to compliance with the procedural terms of sec. 147.20, authorizes a declaratory challenge to the validity of the rule underlying the permit.

102 Wis. 2d at 628. The court also went on ultimately to hold, "We conclude that the commissions' failure to challenge the department's authority under the procedures of sec. 147.20, Stats., precluded the later challenge under ch. 227, because sec. 147.20 is the exclusive method of administrative and judicial review of the department's action." 102 Wis. 2d at 621. Moreover, the court quoted from *Superior v. Committee on Water Pollution*, 263 Wis. 23, 26, 56 N.W.2d 501 (1953), holding that an administrative order (more analogous to a permit decision) could not be attacked collaterally in a declaratory judgment action where a more specific procedure, "which, like sec. 147.20, included judicial review . . . subsequent to the agency's review of the challenge . . . ." *Sewerage Commission*, 102 Wis. 2d at 630.

For the above reasons, I believe that "[a]ny permit applicant, permittee, affected state or 5 or more persons" must invoke Wis. Stat. § 283.63 before attempting to obtain judicial review of a DNR WPDES permit term or condition. Finally, please note that Wis. Stat. § 283.63 and the *Sewerage Commission* case apply to reviews of the reasonableness and necessity of WPDES *permit* terms and conditions.[2] Neither Wis. Stat. § 283.63 nor the *Sewerage Commission* case,

[2] Wisconsin Stat. § 283.63(1) also applies to review of "any proposed thermal effluent limitation established under s. 283.17 or any water quality based effluent limitation established under s. 283.13 (5)." These are not the subject of your question, although there is no reason to believe the holdings in *Sewerage Commission* are not applicable to judicial challenges to them.

suggest that declaratory ruling actions under Wis. Stat. § 227.41 or declaratory judgment actions under Wis. Stat. § 227.40 may not apply to the application or validity of WPDES rules under other circumstances than those where a WPDES permit term or condition may be at issue.

Issue #7 NSPS.

Does the Department have authority, pursuant to Wis. Stat. § 283.31(3)(d) and Wis. Admin. Code § NR 220.13, to include limitations in permits based on federal NSPS (New Source Performance Standards) even if the Department has not yet promulgated new or revised rules for the NSPS in the administrative code?

Response: In my view the answer is yes. Clearly, the Department may include limitations in permits based on federal NSPS standards that already are in Department rules. Wis. Stat. § 283.31(3) provides in pertinent part, "The department may issue a permit under this section for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharges will meet . . . the following, whenever applicable: . . . (b) [s]tandards of performance for new sources." The standards in this section of the rule refer to "the state requirements provided in § 283.31(3)(a)-(c)." *Andersen v. Department of Natural Resources*, 2011 WI 19, ¶ 57, 332 Wis. 2d 41, 796 N.W.2d 1.

As for "new or revised" federal NSPS standards that have not been incorporated into Wisconsin permits, Wis. Admin. Code § NR 220.13, provides, "In the event that federal regulations establishing effluent guidelines have been promulgated for a point source included in one of the categories and classes of point sources listed in s. NR 220.02, the department may establish in the discharge permit for such source, effluent limitations based upon these federal regulations."

This rule is consistent with Wis. Stat. § 283.31(3), which provides that the "department may issue a permit . . . for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharges will meet . . . (d) [a]ny more stringent limitations, including those: 1. [n]ecessary to meet federal . . . water quality standards" or "2. . . . to comply with any applicable federal law or regulation." The statute is express and clear that the DNR may issue a permit that complies with federal new source performance standards and effluent limitations that are "more stringent" than state new source performance standards and limitations referred to in Wis. Stat. § 283.31(a)-(c) without DNR having first promulgated the federal standards as state rules. In *Andersen*, the Wisconsin Supreme Court sustained the Department's explanation of Wis. Stat. § 283.31(3)(d)2., which interprets that particular subsection as requiring "the DNR to issue permits that meet the requirements of 'any applicable federal law or regulation' that the EPA has promulgated over a state rule—that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)–(c)." *Andersen*, 332 Wis. 2d 41, ¶ 55. In *Andersen*, the court held that Wis. Stat. § 283.31(3)(d)2. applies only to new or revised federal standards or limitations that are "promulgated over a state rule", that is, over an existing state

rule within the contemplation of Wis. Stat. § 283.31(3)(a)-(c), which includes new source performance standards. 332 Wis. 2d 41, ¶¶ 55, 57. Based on the court's reasoning, it follows that if there are new or revised NSPS standards adopted by EPA and the state has not yet revised those new standards or limitations, the DNR still may include the new or revised more stringent federal limitations in the permit for the types of standards and limitations specified in Wis. Stat. § 283.31(3)(a)-(c). 332 Wis. 2d 41, ¶¶ 55, 57. As DNR has adopted NSPS rules as contemplated in Wis. Stat. § 283.31(3)(b), DNR may incorporate new "more stringent" federal NSPS standards in WPDES permits without having first incorporating them in DNR rules. *See also* discussion of *Andersen, infra.*

Issue #10 GLI Procedures.

Is the Department's interpretation of its authority under Wis. Stat. § 283.31 consistent with the Wisconsin Supreme Court's decision in the *Andersen* case? Specifically, does the Department have the authority to administer applicable provisions of 40 C.F.R. § 132.6 (concerning discharges of toxic substance to the Great Lakes Basin in Great Lakes states)?

Response: In my view the answer is yes. In *Andersen v. Department of Natural Resources*, the Wisconsin Supreme Court sustained the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. that the "more stringent" language in the statute refers to "any applicable federal law or regulation that the EPA has promulgated over a state rule," 332 Wis. 2d 41, ¶ 57, "that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)–(c)." 332 Wis. 2d 41, ¶ 55. The court explained, "It is therefore reasonable to interpret the language of '[a]ny more stringent limitations' as referring back to the previous subsections; that is, pursuant to § 283.31(3)(d)2, all WPDES permits, whenever applicable, must meet more stringent limitations than the state requirements provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 57. As an example of a regulation that the EPA has promulgated over a state rule, the court cited 40 C.F.R. § 132.6(f) – (j), which "expressly apply[s] certain federal requirements to the Great Lakes System in the State of Wisconsin." 332 Wis. 2d 41, ¶ 55, n. 20. It is necessary for the Department to set more stringent effluent limitations and standards in discharge permits in order to comply with the procedures contained within 40 C.F.R. § 132.6(f) – (j). Because the applicable provisions of 40 C.F.R. § 132.6 were promulgated by the EPA "over a state rule," as that term is used in *Andersen*, and the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. is valid, the Department is authorized to administer those provisions in WPDES permits for discharges to the Great Lakes Basin.

Issue # 12 Downstream Waters.

Does the Department have authority to impose permit conditions to assure compliance with the applicable water quality requirements of all affected states (including tribes)?

Response: In my view the answer is yes. Wisconsin Stat. § 283.13(5) provides that the Department "shall require compliance with . . . water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation." Under 40 C.F.R. § 131.8, the EPA may approve a federally recognized Indian tribe to administer a water quality standards program in the same manner as a state.

In addition, Wis. Stat. § 283.31(3)(d)1. and 2. allows the Department to issue a WPDES permit with more stringent limitations if "[n]ecessary to meet federal or state water quality standards" or "[n]ecessary to comply with any applicable federal law or regulation." Wisconsin Admin. Code §§ NR 106.06(1)(b)1., NR 106.32(1)(b), 106.55(9), and 106.56(9) all contain provisions allowing the Department to establish water quality based effluent limitations necessary to protect downstream waters. The term "downstream waters" as used in these rules is not limited to intrastate waters. Downstream waters would include navigable waters of the United States that are protected by state and tribal water quality standards that have been adopted in compliance with and as required by the federal Clean Water Act. *See* 33 U.S.C. § 1312(a).

Also, Wis. Stat. § 283.41 and Wis. Admin. Code § NR 203.03 require the Department to provide notice of receipt of a completed permit application to other government agencies, which include "other states potentially affected by the proposed discharge." State and tribal government agencies are permitted to "obtain additional information, submit written comments, or request a public hearing with respect to issuance of a particular permit." Wis. Admin. Code § NR 203.03(1).

<u>Issue # 19 and #44 Concentrated Aquatic Animal Production facilities and the definitions of point source and pollutant.</u>

1. Does the Department have the authority to issue WPDES permits to fish hatcheries that meet the definition of concentrated aquatic animal production facilities?

Response: In my view the answer is yes. The department also has the authority to issue WPDES permits to fish hatcheries that do not meet the definition of concentrated aquatic animal production facilities. You state that DNR has been issuing WPDES permits to fish hatcheries that meet the definition of concentrated aquatic animal production facilities under Wis. Stat. §§ 283.01(12) & (13), and 283.31.

40 C.F.R. § 122.24 (b) & (c) provide:

> (b) Definition. "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.

> (c) Case-by-case designation of concentrated aquatic animal production facilities.
>
> (1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. . . .

Appendix C prescribes standard criteria for defining a concentrated aquatic animal production facility as containing fish species or other aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year, and are fed threshold amounts of food or produce threshold amounts (by weight) of fish.

Wisconsin Stat. § 283.31(1) provides in pertinent part, "The discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge or disposal is done under a permit issued by the department under this section . . . ." Wisconsin Stat. § 283.01(12) defines a point source as "[a] discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . . container . . . from which pollutants may be discharged . . . into waters of the state." The purpose of fish hatcheries and aquatic animal production facilities is to confine, produce and cultivate fish for either consumption or for stocking waterways. Fish hatcheries and concentrated aquatic animal production facilities are and operate by use of some or all of the conveyances described in Wis. Stat. § 283.01(12). The feces and waste products produced at fish hatcheries and concentrated aquatic animal production facilities consist of biological materials, which are defined under Wis. Stat. § 283.01(13) as a pollutant. Wisconsin Admin. Code § NR 220.02(20) appropriately includes fish hatcheries as point sources that are regulated under Wis. Stat. ch. 283.

2. Are the definitions of "discharge" and "point source" broad enough to require permits for discharges from landfill leachate collection systems?

Response: In my view the answer is yes. Landfill leachate contains material that is defined as a pollutant under Wis. Stat. § 283.01(13). Any landfill leachate collection system that discharges to any water of the state, which includes groundwater under Wis. Stat. § 283.01(20), meets the definition of a "discharge" and "discharge of pollutant" under Wis. Stat. § 283.01 (4) & (5), respectively. A landfill leachate collection system that discharges to waters of the state satisfies the definition of point source under Wis. Stat. § 283.01(12)(a) because a collection system is a discernible, confined and discrete conveyance of pollutants that discharge to waters of the state. The discharge of pollutants from a leachate collection system to waters of the state is prohibited unless permitted by DNR. Wis. Stat. § 283.31(1).

3. Is the definition of "pollutant" broad enough to cover discharges of filter backwash from a point source?

Response: In my view the answer is yes. The purpose of backwashing a filter is to remove dirt, filth, grease, fibers, particles and other pollutants from the filter's pores. The particles being removed by the backwashing process are either (a) pollutants that are already the subject of a WPDES permit (thus requiring the filter), or (b) fit into the broad definition of pollutant under Wis. Stat. § 283.01(13), which includes solid waste, chemical waste, biological material, rock, sand, and industrial, municipal, and agricultural waste.

Issue # 51 Request for an Informational Hearing.

Is Wisconsin law, concerning an individual's request for a public hearing on a draft WPDES permit, consistent with federal regulations?

Response: In my view the answer is yes. 40 C.F.R. § 124.11 states that "any interested person . . . may request a public hearing on the draft permit." 40 C.F.R. § 124.12(a)(1) states that "[t]he Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest . . . ." Wisconsin Stat. § 283.49(1)(a) states that any person may request a public hearing, and that the request must "indicate the interest of the party filing the request and the reasons why a hearing is warranted." In addition, Wisconsin Stat. § 283.49(1)(b) states that "[t]he department shall hold a public hearing on a permit application . . . on the petition of 5 or more persons or if the department deems that there is a significant public interest in holding such a hearing." Wisconsin Stat. § 283.49(1)(a) clearly provides any interested individual the right to request a public hearing and for the DNR to grant it based on the person's interest and reasons warranting a hearing. Therefore, the requirement in 40 C.F.R. § 124.11, that any interested person may request a public hearing, is satisfied. Wisconsin Stat. § 283.49(1)(b) clearly provides the Department discretion to grant a public hearing based on sufficient public interest. Like 40 C.F.R. § 124.12(1), the Department is required to hold a public hearing when it "deems that there is a significant public interest in holding such a hearing." Wis. Stat. § 283.49(1)(b). Therefore, the requirements of 40 C.F.R. § 124.12(1) are satisfied by Wisconsin law.

Issue # 58 Waters of the State Definition.

Is Wisconsin's definition of "waters of the state" broad enough to include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes?

Response: In my view the answer is yes. Wisconsin's broad definition of "waters of the state" is "those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are

entirely confined and retained completely upon the property of a person." Wis. Stat. § 283.01(20); *See also* Wis. Admin. Code § NR 205.03(44).

The definition includes wetlands and other water places where water is part of the groundwater or near or at the surface. Wisconsin statutes define "wetland" as "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." Wis. Stat. §§ 23.32(1) and 281.01(21). Under Wis. Stat. § 281.15(1), the Department is required to establish water quality standards for all waters of the state. As a result, the Department promulgated Wis. Admin. Code ch. NR 103, Water Quality Standards for Wetlands.

Moreover, the phrase "other surface water or groundwater" in Wis. Stat. § 283.01(20) is broad enough to include mudflats, sandflats, sloughs, prairie potholes, wet meadows, and playa lakes which, like wetlands, are areas that consist of water either below, at, or above the land surface, which is surface or ground water. Point source discharges into these areas undoubtedly would enter ground or surface waters, and thus are prohibited without a permit.

Issue # 59 Exemption for Disposal of Solid Waste to a Landfill – Wis. Admin. Code § NR 200.03(3)(f).

Is the exemption from a permit application for disposal of solid waste into a solid waste facility consistent with federal law?

Response: In my view the answer is yes. The exemption in Wis. Admin. Code § NR 200.03(3)(f) allows a person to deposit solid waste into a licensed solid waste facility without obtaining a pollution discharge permit. A solid waste facility is not included among "waters of the state" and, therefore, a discharge of solid waste to a solid waste facility does not require a WPDES permit. *See* Wis. Stat. § 283.31(1); Wis. Admin. Code § NR 200.03(1). If the solid waste facility discharges solid waste into ground or surface waters of the state, then the solid waste facility is a point source and must have a WPDES permit.

Issue # 60 Exemption for Discharges from Private Alcohol Fuel Production Systems in Wis. Stat. § 283.61.

Does the Attorney General agree with the Department's interpretation of the law that the private alcohol fuel production systems exemption does not apply to discharges from such systems that reach waters of the United States?

Response: The answer is yes. "Waters of the United States" as that term is used in the Clean Water Act are navigable surface waters, or waters or wetlands having a sufficient "nexus" to them so that pollution of them would "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos v.*

U.S., 547 U.S. 715, 780 (2006, Kennedy, J., concurring); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167-168 (2001). "Waters of the state" are ground and surface waters, Wis. Stat. § 283.01(20), and thus include "waters of the United States."

Under Wis. Stat. § 283.61(2), the owner of a private alcohol fuel production system is not required to obtain a WPDES permit "to discharge or dispose of any distillate waste product if the waste product is stored in an environmentally sound storage facility and disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An environmentally sound storage facility is a distillate waste facility that does not allow any waste products to "enter or leach into the waters of the state." Wis. Stat. §§ 283.61(1)(b) and 289.44(1)(b). Thus, no permit is required for a distillate waste storage facility that is stored in an environmentally sound manner because there would be no discharge. If discharges from such facilities were to occur, they would violate the prohibition of discharges from point sources without a permit. Wis. Stat. § 283.31(1).

As for discharges and disposal of distillate waste product, the statute requires that it be "disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An "environmentally safe land spreading technique" is not defined in the statutes or Department rules. However, by requiring an "environmentally safe land spreading technique," the owner must discharge the distillate waste onto land, as opposed to discharging into surface water, whether directly or indirectly. Moreover, if the discharge were to enter a surface water, then it would no longer be confined exclusively to the owner's land.

Issue # 63 False Statements.

Does the state have the authority under either state statutes or rules to assess multiple penalties for multiple instances of knowingly making false statements consistent with 40 C.F.R. § 123.27?

Response: In my view the answer is yes. 40 C.F.R. § 123.27(a)(3)(iii) states that "[c]riminal fines shall be recoverable against any person who knowingly makes any false statement . . . fines shall be recoverable . . . for each instance of violation." Wisconsin Stat. § 283.91(4) states that "[a]ny person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall be fined not less than $10 nor more than $10,000 or imprisoned for not more than 6 months or both."

On its face, Wis. Stat. § 283.91(4) allows the assessment of multiple penalties for multiple instances, respectively, of knowingly making false statements. The statute states that

"any" person making "any" false statement on "any" application shall be fined. Therefore, each false statement made by a person on a single application is a false statement that will subject the person to a fine or imprisonment. This is not only the interpretation of the Department, but is also the interpretation and practice of the Department of Justice in charging violations under this statute.

Issue # 64 Public Participation in Enforcement Process.

Does the state provide for public participation in the state enforcement process consistent with 40 CFR § 123.27(d)?

Response: In my view the answer is yes. 40 CFR § 123.27(d) requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing either:" (1) an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program, or (2) by providing a system in which the Department or the DOJ will "provide written responses to all citizen complaints," "[n]ot oppose intervention by any citizen" when authorized by law, and "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."

The State does not provide for administrative enforcement actions under Wis. Stat. ch. 283. All enforcement actions are civil or criminal in nature. The State provides for public participation under option (1) above by allowing adversely affected citizens to intervene in any civil enforcement action. Wisconsin Stat. § 803.09(1) provides a right of intervention by anyone in an action if they meet the following requirements: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994). The State often settles an enforcement action before a complaint is filed with a court, and then files the complaint and a stipulation and order for judgment at the same time effectively beginning and ending the lawsuit on the same day. An entry of judgment is not a bar to intervention. The Wisconsin Court of Appeals stated that "'[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner.'" *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), quoting *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), cert. denied, *National Farmers' Organization, Inc. v. U.S.*, 429 U.S. 940 (1976). "[P]ost judgment intervention may be allowed where it is the only way to protect the movant's rights." *Sewage Commission*, 104 Wis. 2d at 188.

Issue # 75 Wis. Stat. § 227.10(2m).

Taking into account the recent enactment of Wis. Stat. § 227.10(2m), does the state still have adequate permitting and enforcement authority required pursuant to 40 C.F.R. §§ 123.25 and 123.27?

Response: In my view the answer is yes. 40 C.F.R. §§ 123.25 and 123.27 are provided with this letter. They provide a list of the federal requirements for permitting and enforcement, respectively. Your question is whether the long-standing authority to comply with these requirements remains after enactment of Wis. Stat. § 227.10(2m). Recently enacted Wis. Stat. § 227.10(2m) states, in part, that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter."

First, the enactment of Wis. Stat. § 227.10(2m) did not change the Department's express and clear authority for permitting discharge of pollutants as stated in 40 C.F.R. § 123.25. Under Wis. Stat. § 283.31(1), "[t]he discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge . . . is done under a permit issued by the department." The Department is "explicitly" granted authority to issue a permit for the discharge of a pollutant based on whether the discharge will meet certain limitations and standards, including any more stringent limitation "[n]ecessary to comply with any applicable federal law or regulation." Wis. Stat. § 283.31(3).

The enactment of Wis. Stat. § 227.10(2m) did not change the Department's explicit authority and duty to promulgate rules that ensure compliance with federal standards. Wisconsin Stat. § 283.001(2) states that "[t]he purpose of [Wis. Stat. ch. 283] is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1) and *consistent with all the requirements of the federal water pollution control act amendments of 1972*, P.L. 92-500; 86 Stat. 816." (Emphasis added.) That authority specifically is provided under Wis. Stat. § 283.11(1), in which the Department is explicitly required to "promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, toxic effluent standards or prohibitions or pretreatment standards for any pollutant." Furthermore, Wis. Stat. § 283.11(2) explicitly requires that all rules promulgated by the Department under Wis. Stat. ch. 283 "as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387."

Second, the Department has adequate authority to enforce WPDES permits as required by 40 C.F.R. § 123.27. Wisconsin Stat. § 283.91(1) states that "[t]he department of justice . . . may initiate a civil action for a temporary or permanent injunction for any violation of this chapter or any rule promulgated thereunder or of a term or condition of any permit issued under this chapter." Any person that violates a term or condition of a permit or knowingly makes false statements is subject to forfeitures and may be subject to imprisonment. Wis. Stat. § 283.91(2), (3), and (4). *See also* Wis. Stat. § 299.95.

Issue: What are the primary holdings in *Andersen v. Department of Natural Resources*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1?

You ask for a statement on the primary holdings in the *Andersen* case.

Response: The primary holding of *Andersen* is that "Wis. Stat. § 283.63 does not require the DNR to hold a public hearing on a petition for review when the premise of the petition is that the permit fails to comply with basic requirements of the federal Clean Water Act and federal regulations promulgated thereunder." 332 Wis. 2d 41, ¶ 58. See also ¶ 8. *See also* discussion above under "Issue #7 NSPS" and "Issue #10 GLI Procedures."

The court also held that there is no provision in state law, i.e., Wis. Stat. ch. 283, that *generally* requires DNR to issue permits (as opposed to rules, 332 Wis. 2d 41, ¶¶ 43, 51) that comply with federal Clean Water Act standards.

The court did hold, however, there is one narrow exception in state law that requires DNR to issue a permit in compliance with a federal standard. The court held that Wis. Stat. § 283.31(3)(d)2. requires DNR to establish more stringent limitations in permits where "EPA has promulgated over a state rule – that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a-(c)." 332 Wis. 2d 41, ¶ 55, 57. The court held that where new or revised federal laws or regulations are promulgated by EPA and dictate a more stringent limitation compared to the *existing* state limitations and standards listed in Wis. Stat. § 283.31(3)(a)–(c), the DNR has the authority to include those new or revised more stringent federal limitations in state permits. The court held, however, that these conditions for operation of the exception did not exist in that case.

In *Andersen*, petitioners did not argue that the WPDES permit was inconsistent with an existing *state* law or standard. Rather, they argued that some of the terms in the state permit were inconsistent with *federal* Clean Water Act standards, that state permits must be consistent with federal law and standards and, therefore, some of the state permit terms were invalid. *Id.* at ¶¶ 12, 17. The court concluded that in such a situation "only the EPA has the authority to determine whether a WPDES permit comports with federal law." *Id.* at ¶ 25. The EPA has the authority to object to the permit as being inconsistent with federal law, but did not in this case. *Id.* at ¶ 62. "[T]he EPA has the authority to withdraw its approval of a state's permit program if

the program no longer complies with the requirements of 40 C.F.R. pt. 123 and of the Clean Water Act, and if the state fails to take corrective action." 332 Wis. 2d 41, ¶ 39. At that point, EPA may choose to administer and enforce the federal Clean Water Act provisions in the noncomplying state. *Id.* at ¶¶ 35, 36.

This holding and conclusion are consistent with well established law governing the relationship in our federal system between the states and the federal government that respects state sovereignty. States administer and enforce state laws. They do not administer and enforce federal laws. Neither the courts nor EPA can legally force Wisconsin to administer a federal permit provision. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York v. U.S.*, 505 U.S. 144, 178 (1992). Under the "partnership" of "cooperative federalism" envisioned in the Clean Water Act, the states do not administer and enforce the federal law, *per se*. If states choose to administer laws and programs consistent with federal laws and programs, they do so only voluntarily and as a matter of state law. Only the federal government may enforce federal laws.

Consistent with cooperative federalism principles, the court in *Andersen* recognized that if a state wishes to administer state laws that are similar to or mirror-images of provisions of the Clean Water Act, "the Clean Water Act empowers each state to administer 'its own permit program for discharges into navigable waters within its jurisdiction . . .'" – under state law consistent with the Clean Water Act. *Andersen*, 332 Wis. 2d 41, ¶ 34. Such so-called "delegated" state programs are administered under *state* law, however, with or without federal approval. The benefit of EPA approval, of course, is that under the Clean Water Act "[o]nce a state program is approved, the EPA must suspend its own issuance of NPDES permits covering the navigable waters subject to the state program." *Id.* at ¶ 36.

Make no mistake, however, the state is administering state law, here Wis. Stat. ch. 283, not the federal Clean Water Act, in Wisconsin. For example, as stated previously, Wis. Stat. § 283.11(1) & (2) require DNR to adopt rules consistent with the requirements of the Clean Water Act. To the extent that Wisconsin permits might not be consistent with the Clean Water Act and its regulations, this would not be a "violation" of the Clean Water Act per se, certainly not in the sense that the state can be forced to administer the Act as EPA requires, or that the inconsistency may be enforced by fines or injunction. It merely means, as the court in *Andersen* said, that when there is no violation of state law and it is alleged that a state permit is inconsistent with the existing federal law, it is up to EPA, the agency that administers and enforces the federal law, to decide whether a permit or the state program does not comply with federal law. Such a decision could then precipitate an EPA objection to the state permit and resolution between DNR and EPA, issuance of an EPA permit with required limitations, or in an extreme case EPA disapproval of Wisconsin's program and decision to administer the federal program by issuing its own permits in Wisconsin. Under any circumstance, EPA cannot amend or repeal

Wis. Stat. ch. 283, nor may it impose the Clean Water Act on Wisconsin to administer. Of course, the whole point of Wis. Stat. ch. 283 and Wisconsin's WPDES program is to allow the State to administer a program that would not invite such federal intervention.

In *Andersen*, because DNR is authorized to administer the WPDES program only as directed under state law, the issue before the court was whether DNR's permit terms violated state law, not whether DNR's permit terms violated federal law. As stated above, the court could find no state law that generally required DNR to issue a permit that includes all federal requirements. As noted above, Wis. Stat. § 283.11 does require DNR to adopt rules consistent with the requirements of the Clean Water Act.

The court did hold that one state law, Wis. Stat. § 283.31(3)(d)2., does specifically require DNR to issue permits consistent with "any applicable federal law or regulation that the EPA has promulgated over a state rule," 332 Wis. 2d 41, ¶ 57, – "that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)–(c)." 332 Wis. 2d 41, ¶ 55. The court held, however, that it did not apply in this case. "By the statute's plain language, the 'applicable federal law or regulation' must provide for a 'more stringent limitation[]' than something else. It is therefore reasonable to interpret the language of '[a]ny more stringent limitations' as referring back to the previous subsections; that is, pursuant to § 283.31(3)(d)2, all WPDES permits, whenever applicable, must meet more stringent limitations than the state requirements provided in § 283.31(3)(a)–(c), including those necessary to comply with any applicable federal law or regulation." 332 Wis. 2d 41, ¶ 57. The court agreed with DNR's interpretation that this statutory provision applies in those situations where EPA has overpromulgated the state rules. It follows that it also applies to those situations where EPA has promulgated a new or revised more stringent limitation that is the type of limitations in Wis. Stat. § 283.31(3)(a)-(c), but where the state has not yet updated its regulation to include the limitation. Thus, Wis. Stat. § 283.31(3)(d)2. did not apply to require the federal standard to be incorporated in the state permit. The court correctly held that the only remedy for the situation in *Andersen* "rests with the EPA" under federal law. 332 Wis. 2d 41, ¶¶ 8, 65, 66.

If you have any questions regarding the Department of Justice's response to the issues detailed in your October 14, 2011 letter, please contact Assistant Attorney General Thomas Dawson at (608) 266-8987.

Sincerely,

J.B. VAN HOLLEN
Attorney General

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